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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 THOMAS MICHAEL BENHOFF,
12 Booking #13769047,
13 Plaintiff,

14 vs.

15 UNITED STATES DEPARTMENT OF
16 JUSTICE, et al.,
17 Defendants.
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Case No.: 3:16-cv-01095-GPC-JLB

ORDER:

**1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
PURSUANT TO 28 U.S.C. § 1915(a)
[ECF No. 2]**

AND

**2) DIRECTING U.S. MARSHAL TO
EFFECT SERVICE PURSUANT TO
28 U.S.C. § 1915(d) AND
Fed. R. Civ. P. 4(c)(3)**

22 THOMAS MICHAEL BENHOFF (“Plaintiff”), currently detained at the San Diego
23 County Jail (“SDCJ”), awaiting trial in *People v. Benhoff*, San Diego Superior Court Case
24 No. SCD324140, and proceeding pro se, has filed a “Complaint under the Administrative
25 Procedures Act to Compel Disclosure of FOIA Materials” pursuant to 5 U.S.C. §§ 552 and
26 701, et seq., *see* ECF No. 1 at 1-2, together with a Motion to Proceed In Forma Pauperis
27 (“IFP”) (ECF No. 2).
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Plaintiff seeks “injunctive and/or mandamus relief” compelling the U.S. Department of Justice, Laura E. Duffy, the United States Attorney for the Southern District of California, and Kyle W. Hoffman, an Assistant United States Attorney for the Southern District of California (“Defendants”) “to provide all available, non-exempt materials and information responsive to” nine Freedom of Information Act (“FOIA”) requests Defendants “have improperly refused to produce to him,” in response to a subpoena, which he claims are “directly exculpatory” and “would enable [him] to prove his factual innocence in his pending state criminal proceeding.” *See* ECF No. 1 at 1, 4, 5 & Ex. A at 7-9.¹

I. Plaintiff’s Motion to Proceed IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$400.² *See* 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to

¹ Federal agencies have regulations implementing policies for disclosing information in response to a subpoena. *See Mak v. FBI*, 252 F.3d 1089, 1092 (9th Cir. 2001). The regulations, known as *Touhy* regulations, are codified at 28 C.F.R. §§ 16.21–16.29, and were adopted following the Supreme Court’s decision in *Touhy v. Ragen*, 340 U.S. 462 (1951). *Touhy* held, in general, that federal officials could not be held in contempt for failing to disclose information demanded. *Id.* at 469; *see also Kwan Fai Mak v. FBI*, 252 F.3d 1089, 1093 (9th Cir. 2001). Plaintiff’s exhibits reveal he seeks to challenge Defendants’ refusal to produce documents ostensibly held by the FBI’s Computer Crimes Unit, based on his purported failure to meet conditions set by 28 C.F.R. §§ 16.21-16.27. (ECF No. 1, Ex. A at 11-12; Ex. B at 19-23.)

² In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14 (eff. Dec. 1, 2014)). The additional \$50 administrative fee does not apply to persons granted leave to proceed IFP. *Id.*

1 proceed IFP remains obligated to pay the entire fee in “increments” or “installments,”
2 *Bruce v. Samuels*, __ U.S. __, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d
3 1182, 1185 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed.
4 *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

5 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
6 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the
7 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
8 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
9 trust account statement, the Court assesses an initial payment of 20% of (a) the average
10 monthly deposits in the account for the past six months, or (b) the average monthly balance
11 in the account for the past six months, whichever is greater, unless the prisoner has no
12 assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody
13 of the prisoner then collects subsequent payments, assessed at 20% of the preceding
14 month’s income, in any month in which his account exceeds \$10, and forwards those
15 payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Bruce*,
16 136 S. Ct. at 629.

17 In support of his IFP motion, Plaintiff has submitted a copy of SDCJ trust account
18 activity for the three-month period between January 1, 2016, and March 23, 2016 (ECF
19 No. 2 at 6). While 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2 technically require
20 Plaintiff to submit *six* months of accounting, Plaintiff’s account statements show he had an
21 available balance of only \$1.89 in his account at the time of filing, and he swears, under
22 penalty of perjury, that SDCJ officials informed him they could only provide him with
23 three months of accounting. *Id.* at 2.

24 Based on these submissions, the Court finds Plaintiff’s motion sufficient to show he
25 is “unable to pay” any initial partial filing fee pursuant to 28 U.S.C. § 1915(a)(a) and (b)(1)
26 at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be
27 prohibited from bringing a civil action or appealing a civil action or criminal judgment for
28 the reason that the prisoner has no assets and no means by which to pay the initial partial

filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds available to him when payment is ordered.”).

Accordingly, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 2), declines to “exact” any initial filing fee because his SDCJ certificate shows he “has no means to pay it,” *Bruce*, 136 S. Ct. at 629, and directs the Watch Commander of the SDCJ, or his designee, to collect the entire \$350 balance of the filing fees required by 28 U.S.C. § 1914 and to forward them to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1). *See id.*

II. Initial Screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A

Notwithstanding Plaintiff’s IFP status or the payment of any filing fees, the PLRA also requires the Court to review complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these statutes, the Court must sua sponte dismiss any complaint, or any portion of a complaint, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

All complaints must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). Detailed factual allegations are not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the

1 reviewing court to draw on its judicial experience and common sense.” *Id.* The “mere
2 possibility of misconduct” falls short of meeting this plausibility standard. *Id.*; *see also*
3 *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

4 “When there are well-pleaded factual allegations, a court should assume their
5 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
6 *Iqbal*, 556 U.S. at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)
7 (“[W]hen determining whether a complaint states a claim, a court must accept as true all
8 allegations of material fact and must construe those facts in the light most favorable to the
9 plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that
10 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6).”).

11 However, while the court “ha[s] an obligation where the petitioner is pro se,
12 particularly in civil rights cases, to construe the pleadings liberally and to afford the
13 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
14 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not
15 “supply essential elements of claims that were not initially pled.” *Ivey v. Bd. of Regents of*
16 *the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

17 As currently pleaded, the Court finds Plaintiff’s Complaint contains claims sufficient
18 to survive the “low threshold” for proceeding past the sua sponte screening required by 28
19 U.S.C. §§ 1915(e)(2) and 1915A(b). *See Wilhelm v. Rotman*, 680 F.3d 1113, 1123 (9th Cir.
20 2012).³ Accordingly, the Court will direct the U.S. Marshal to effect service upon
21 Defendants on Plaintiff’s behalf. *See* 28 U.S.C. § 1915(d) (“The officers of the court shall
22 issue and serve all process, and perform all duties in [IFP] cases.”); FED. R. CIV. P. 4(c)(3)
23 (“[T]he court may order that service be made by a United States marshal or deputy marshal
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26 ³ Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative
27 of, and not a substitute for, any subsequent Rule 12(b)(6) motion that [any individual
28 defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D.
Cal. 2007).

... if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915.”).

III. Conclusion and Orders

Good cause appearing, the Court:

1. **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF No. 2);

2. **DIRECTS** the Watch Commander of the SDCJ, or his designee, to collect from Plaintiff’s inmate trust account the \$350 filing fee owed in this case by garnishing monthly payments from his account in an amount equal to twenty percent (20%) of the preceding month’s income and forwarding those payments to the Clerk of the Court each time the amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION;

3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on the Watch Commander, San Diego Central Jail, 1173 Front Street, San Diego, California 92101;

4. **DIRECTS** the Clerk to issue a summons as to Plaintiff’s Complaint (ECF No. 1) upon Defendants and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each Defendant.⁴ In addition, the Clerk will provide Plaintiff with a certified copy of this Order, a certified copy of his Complaint and the summons so that he may serve the Defendants. Upon receipt of this “IFP Package,” Plaintiff must complete the Form 285s as completely and accurately as possible, and return them to the United States Marshal according to the instructions the Clerk provides in the letter accompanying his IFP package;

5. **ORDERS** the U.S. Marshal to serve a copy of the Complaint and summons upon Defendants as directed by Plaintiff on the USM Form 285s provided to him. All costs

⁴ Plaintiff is cautioned that because he has named an agency and officers or employees of the United States as Defendants, he must comply with the service requirements set out in FED. R. CIV. P. 4(i). *See e.g., Tracy v. United States*, 243 F.R.D. 662, 665-66 (D. Nev. 2007).

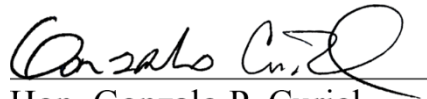
1 of that service will be advanced by the United States. *See* 28 U.S.C. § 1915(d); FED. R.
2 CIV. P. 4(c)(3);

3 6. **ORDERS** Defendants to reply to Plaintiff's Complaint within the time
4 provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42
5 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to "waive the right
6 to reply to any action brought by a prisoner confined in any jail, prison, or other correctional
7 facility under section 1983," once the Court has conducted its sua sponte screening
8 pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary
9 determination based on the face on the pleading alone that Plaintiff has a "reasonable
10 opportunity to prevail on the merits," the defendant is required to respond); and

11 7. **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to
12 serve upon Defendants, or, if appearance has been entered by counsel, upon Defendants'
13 counsel, a copy of every further pleading, motion, or other document submitted for the
14 Court's consideration pursuant to FED. R. CIV. P. 5(b). Plaintiff must include with every
15 original document he seeks to file with the Clerk of the Court, a certificate stating the
16 manner in which a true and correct copy of that document has been was served on
17 Defendants or their counsel, and the date of that service. *See* S.D. CAL. CIVLR 5.2. Any
18 document received by the Court which has not been properly filed with the Clerk or which
19 fails to include a Certificate of Service upon Defendants may be disregarded.

20 **IT IS SO ORDERED.**

21 Dated: June 14, 2016

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23 Hon. Gonzalo P. Curiel
24 United States District Judge
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